

Aug 09, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEANETTE O.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-cv-03241-SAB

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 11 and 12. The motions were heard without oral argument. For the reasons set forth below, the Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

BACKGROUND

On May 8, 2015, Plaintiff protectively filed an application for supplemental security income, alleging disability beginning May 1, 2015. The claim was denied initially on July 21, 2015, and upon reconsideration on October 12, 2015. Plaintiff filed a request for a hearing before an Administrative Law Judge (ALJ).

Plaintiff appeared before an ALJ on June 9, 2017, in Yakima, Washington. Also present at the hearing was Plaintiff's attorney and Kimberly Mullinax, an impartial vocational expert. The ALJ issued an unfavorable decision on December

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ^ 1**

1 28, 2017. AR 22. The Appeals Council denied Plaintiff's request for review on
2 November 6, 2018. AR 1.

3 Plaintiff filed a timely appeal to the United States District Court for the
4 Eastern District of Washington on December 27, 2018. ECF No. 1. This matter is
5 before this Court under 42 U.S.C. § 1383(c)(3).

6 SEQUENTIAL EVALUATION PROCESS

7 The Social Security Act defines disability as the "inability to engage in any
8 substantial gainful activity by reason of any medically determinable physical or
9 mental impairment which can be expected to result in death or which has lasted or
10 can be expected to last for a continuous period of not less than twelve months." 42
11 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a disability
12 only if his impairments are of such severity that the claimant is not only unable to
13 do his previous work, but cannot, considering the claimant's age, education, and
14 work experiences, engage in any other substantial gainful work which exists in the
15 national economy. 42 U.S.C. § 1382c(a)(3)(B).

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person meets the definition of disabled under the Social
18 Security Act. 20 C.F.R. § 404.1520(a)(4); *Bowen v. Yuckert*, 482 U.S. 137, 140-42
19 (1987).

20 At step one, the ALJ must determine whether the claimant is presently
21 engaged in "substantial gainful activity." 20 C.F.R. § 404.1520(b). Substantial
22 gainful activity is defined as significant physical or mental activities done or
23 usually done for profit. 20 C.F.R. § 404.1572. If the individual is engaged in
24 substantial gainful activity, he or she is not disabled. 20 C.F.R. § 404.1571. If not,
25 the ALJ proceeds to step two.

26 At step two, the ALJ must determine whether the claimant has a severe
27 medically determinable impairment, or combination of impairments, that
28 significantly limits the claimant's physical or mental ability to do basic work

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ^ 2**

1 activities. 20 C.F.R. § 404.1520(c). If the claimant does not have a severe
2 medically determinable impairment or combination of impairments, he or she is
3 not disabled. If the ALJ finds the claimant does have a severe impairment or
4 combination of impairments, the ALJ proceeds to step three.

5 At step three, the ALJ must determine whether any of the claimant's severe
6 impairments "meets or equals" one of the listed impairments acknowledged by the
7 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
8 20 C.F.R. §§ 404.1520(d), 404.1525; 20 C.F.R. § 404. Subpt. P. App. 1 ("the
9 Listings"). If the impairment meets or equals one of the listed impairments, the
10 claimant is *per se* disabled and qualifies for benefits. If not, the ALJ proceeds to
11 the fourth step.

12 Before considering step four, the ALJ must determine the claimant's
13 "residual functional capacity." 20 C.F.R. § 404.1520(e). An individual's residual
14 functional capacity is his or her ability to do physical and mental work activities on
15 a sustained basis despite limitations from his impairments. 20 C.F.R. §
16 404.1545(a)(1). In making this finding, the ALJ must consider all of the relevant
17 medical and other evidence. 20 C.F.R. § 404.1545(a)(3).

18 At step four, the ALJ must determine whether the claimant's residual
19 functioning capacity enables the claimant to perform past relevant work. 20 C.F.R.
20 § 404.1520(e)-(f). If the claimant can still perform past relevant work, he or she is
21 not disabled. If the ALJ finds the claimant cannot perform past relevant work, the
22 analysis proceeds to the fifth step.

23 At step five, the burden shifts to the Commissioner to prove the claimant is
24 able to perform other work in the national economy, taking into account claimant's
25 age, education, work experience, and residual functional capacity. 20 C.F.R. §
26 404.1520(g). To meet this burden, the Commissioner must establish (1) the
27 claimant is capable of performing other work; and (2) such work exists in
28

1 significant numbers in the national economy. 20 C.F.R. § 404.1560(c)(2); *Tackett*
2 *v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999).

3 **STATEMENT OF FACTS**

4 The Court does not restate the facts of this case as they are presented in the
5 administrative transcript, the ALJ's decision, and the briefs to this Court.

6 **THE ALJ'S FINDINGS**

7 **At step one**, the ALJ found Plaintiff has not engaged in substantial gainful
8 activity since May 8, 2015. AR 28.

9 **At step two**, the ALJ found Plaintiff had the following severe impairments:
10 osteoarthritis of the bilateral knees, status-post right knee meniscectomy and left
11 knee replacement; degenerative joint disease of the bilateral hips; osteoarthritis of
12 the bilateral shoulders; obesity; degenerative disc disease vs. lumbar spondylosis;
13 SI joint dysfunction; asthma; bilateral distal great saphenous vein (GSV)
14 incompetence; and headaches. AR 28.

15 **At step three**, the ALJ found that Plaintiff's impairments or combination of
16 impairments do not meet or medically equal any of the listed impairments in the
17 Listings. AR 31.

18 Before reaching step four, the ALJ found Plaintiff had the Residual
19 Functional Capacity (RFC):

20 To perform sedentary work as defined in 20 C.F.R. § 416.967(a). [Plaintiff]
21 can occasionally reach overhead. [Plaintiff] can frequently reach below-the-
22 shoulder level. [Plaintiff] can frequently push/pull with the upper
23 extremities. [Plaintiff] cannot climb, balance, stoop, kneel, crouch, and
24 crawl. [Plaintiff] should avoid concentrated exposure to vibrations and
25 pulmonary irritants. [Plaintiff] should avoid moderate exposure to hazards
(i.e., working around heights and moving machinery).

26 AR 31-32.

27 **At step four**, the ALJ found Plaintiff was able to perform past relevant work
28 as a customer service representative. AR 39.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ^ 4**

1 As a result, the ALJ found Plaintiff was not under a disability, as defined in
2 the Social Security Act.

3 STANDARD OF REVIEW

4 The Commissioner's determination will be set aside only when the ALJ's
5 finding are based on legal error or are not supported by substantial evidence in the
6 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (citing
7 42 U.S.C. § 405(g). "The findings of the Commissioner of Social Security as to
8 any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. §
9 405(g). Substantial evidence is "more than a mere scintilla," *Richardson v. Perales*,
10 402 U.S. 389, 401 (1971), but "less than a preponderance." *Sorenson v.*
11 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial evidence is
12 "such relevant evidence as a reasonable mind might accept as adequate to support a
13 conclusion." *Richardson*, 402 U.S. at 401.

14 The Court must uphold the ALJ's denial of benefits if the evidence is
15 susceptible to more than one rational interpretation, one of which supports the
16 decision of the administrative law judge. *Batson v. Comm'r of Soc. Sec. Admin.*,
17 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the entire record. *Jones v.*
18 *Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence can support either
19 outcome, the court may not substitute its judgment for that of the ALJ." *Matney*,
20 981 F.2d at 1019.

21 A district court "may not reverse an ALJ's decision on account of an error
22 that is harmless." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). An error
23 is harmless if it is "inconsequential to the ultimate nondisability determination."
24 *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). The
25 burden of showing an error is harmful generally falls upon the party appealing the
26 ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

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**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ^ 5**

ISSUES FOR REVIEW

- (1) Whether the ALJ properly weighed the medical opinion evidence?
- (2) Whether the ALJ properly assessed Plaintiff's subjective symptom testimony?
- (3) Whether the ALJ properly considered Plaintiff's migraines in determining her RFC and ability to return to past relevant work?
- (4) Whether the ALJ properly assessed the Listings?

DISCUSSION

(1) The ALJ Properly Assessed the Medical Opinion Evidence.

Plaintiff argues the ALJ failed to properly consider and weigh the medical opinion evidence. "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001). In the absence of a contrary opinion, a treating physician's opinion may not be rejected unless "clear and convincing" reasons are provided. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If a treating physician's opinion is contradicted, it may be discounted only for "specific and legitimate reasons" supported by substantial evidence in the record." *Id.* at 830 (quoting *Murray v. Heckler*, 722 F.2s 499, 502 (9th Cir. 1983). The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

Plaintiff argues the ALJ failed to properly weigh the medical opinions of Jennifer Williams, PA, David Shoemaker, M.D., and Greg Saue, M.D.

A. Jennifer Williams, PA.

In April 2015, physician's assistant Jennifer Williams completed a Physical Function Evaluation report. AR 512 – 16. Ms. Williams opined that Plaintiff's back, knee, and shoulder pain resulted in very significant interference with

1 Plaintiff's ability to sit, stand, walk, lift, carry, handle, push, pull, reach, stoop, and
2 crouch. AR 513. Ms. Williams concluded that Plaintiff was severely limited, such
3 that Plaintiff is unable to meet the demands of sedentary work. AR 514.

4 As a physician's assistant, Ms. Williams is considered an "other source,"
5 under the operative social security regulations. ¹ 20 C.F.R. §§ 404.1513(d),
6 416.913(d). The opinion of an "other source" generally receives less weight than
7 an acceptable medical source. *Molina*, 674 F.3d at 1111. An ALJ is obligated to
8 provide germane reasons² for discounting "other source" testimony. *Id.* (citing
9 *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010)).

11 ¹ The regulations now recognize physician assistants as acceptable medical sources
12 for claims filed on or after March 27, 2017. 20 C.F.R. §§ 404.1502(a)(8),
13 416.902(a)(8).

14 ² Plaintiff contends Jennifer Williams' opinion is entitled to the deference given to
15 a treating source opinion because it was co-signed by a physician. In *Gomez v.*
16 *Chater*, the Ninth Circuit Court of Appeals held that under 20 C.F.R. §
17 416.913(a)(6), "a nurse practitioner working in conjunction with a physician
18 constitutes an acceptable medical source, while a nurse practitioner working on his
19 or her own does not." 74 F.3d 967, 971 (9th Cir. 1996), *superseded by regulation*
20 *on other grounds as stated in Boyd v. Colvin*, No. 11-36035, 524 Fed.Appx. 334
21 (9th Cir. 2013). 20 C.F.R. § 416.913(a)(6) has since been repealed, and it is unclear
22 whether *Gomez* remains good law. *See, e.g., Molina*, 674 F.3d at 1111 (declining
23 to address whether *Gomez* remains good law but affirming the ALJ's decision not
24 to consider the opinion of a physician's assistant as an acceptable medical source
25 when "the record [did] not show that she worked under a physician's close
26 supervision."). Nonetheless, the mere fact that Jennifer Williams' opinion was co-
27 signed by an acceptable medical source does not, by itself, transform it into a
28 treating source opinion. *Curtis B. v. Comm'r of Soc. Sec.*, 2018 WL 4735624, at *3

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ^ 7**

1 The ALJ gave little weight to Ms. Williams’ opinion for several reasons.
2 First, the ALJ found the opinion to be inconsistent with the fact that, shortly after
3 the opinion was rendered, Plaintiff became a foster parent. AR 38. The ALJ noted
4 that to become a foster parent in Washington, one must demonstrate the he or she
5 possesses the “understanding, ability, physical health, emotional stability and
6 personality suited to meet the physical mental, emotional, cultural, and social
7 needs of children under your care.” *Id.* (citing WAC § 388-148-1365, *recodified*
8 WAC § 110-148-1365). At the hearing, the vocational expert opined that a foster
9 parent is consistent with medium exertional work – which is inconsistent with Ms.
10 Williams’ opinion that Plaintiff is unable to meet the demands of sedentary work.

11 Second, the ALJ found Ms. Williams’ opinion was inconsistent with her
12 own examination findings which show Plaintiff retains a normal gait. AR 1011.

13 Third, the ALJ found Ms. Williams’ opinion was also inconsistent with the
14 longitudinal objective findings. For example, Plaintiff regularly appears in no acute
15 distress during appointments, frequently displays a normal gait, good range of
16 motion in the spine, bilateral shoulders, and other extremities, as well as intact
17 neurological function. AR 39. The ALJ found this objective medical evidence was
18 inconsistent with someone who is severely limited.

19 Fourth, the ALJ found Ms. William’s opinion was inconsistent with
20 Plaintiff’s treatment history. The ALJ noted Plaintiff’s condition improved after
21 her left knee replacement surgery and rhizotomy procedure for her back. AR 39.
22 The ALJ also explained that while Plaintiff complained of left shoulder pain in
23
24

25 (W.D. Wash. Oct. 2, 2018). Other than a “Reviewing and Adopting Professional’s
26 Signature,” AR 514, Plaintiff cites to no evidence to suggest Jennifer Williams
27 “worked under a physician’s close supervision,” such that she acted as the
28 physician’s agent. *Molina*, 674 F.3d at 1111 (citing *Gomez*, 74 F3d at 971).

**ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ^ 8**

1 July 2016, her shoulder condition was essentially asymptomatic for a couple of
2 years prior to this time. *Id.*

3 Finally, the ALJ noted that Ms. Williams is not an acceptable medical source
4 and thus gave greater weight to the opinions of Dr. Saue and Dr. Shoemaker, who
5 are both acceptable medical sources. AR 39.

6 The Court finds the ALJ provided germane reasons for discounting the
7 opinion of physician's assistant Jennifer Williams. The ALJ identified specific
8 ways in which Ms. Williams' opinion was contradicted by the evidence in the
9 record. The ALJ is responsible for resolving conflicts in medical testimony,
10 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995), and this Court will not
11 second-guess the ALJ's findings when they are supported by substantial evidence.
12 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). Accordingly, the Court
13 finds no error.

14 **B. David Shoemaker, M.D.**

15 Dr. Shoemaker completed a Physical Functional Evaluation in February
16 2017. AR 1033 – 37. Dr. Shoemaker opined that Plaintiff's right hip pain caused
17 moderate limitations in Plaintiff's ability to perform certain basic work-related
18 activities. AR 1034. Dr. Shoemaker concluded that Plaintiff was limited to
19 sedentary work. The ALJ gave significant weight to Dr. Shoemaker's opinion. AR
20 38.

21 Plaintiff claims that while the ALJ properly assigned significant weight to
22 Dr. Shoemaker's opinion, the ALJ failed to recognize the limited scope of Dr.
23 Shoemaker's opinion. Plaintiff argues Dr. Shoemaker's opinions are limited to
24 Plaintiff's hip pain, and not the other impairments discussed in Ms. Williams'
25 opinions. By failing to recognize the limited scope of Dr. Shoemaker's opinion,
26 Plaintiff claims the ALJ improperly determined that it conflicts with the opinions
27 of Ms. Williams. This caused the ALJ to improperly discredit Ms. Williams'
28 opinion.

1 Plaintiff's claim lacks merit. As indicated above, the ALJ provided several
2 acceptable reasons for discrediting Ms. Williams' opinion. Thus, even if the ALJ
3 erred in concluding the two opinions were inconsistent on this point, any such error
4 was harmless. The Court finds the ALJ properly evaluated Dr. Shoemaker's
5 medical opinion.

6 **C. Greg Saue, M.D.**

7 In October 2015, Dr. Saue, a State agency medical consultant, opined that
8 Plaintiff could perform sedentary work, with some postural and environmental
9 limitations. AR 152 – 154. Dr. Saue opined that Plaintiff was limited to occasional
10 overhead reaching bilaterally and frequent reaching in all other directions. *Id.* Dr.
11 Saue opined that Plaintiff did not have any limitations with handling, fingering, or
12 feeling. *Id.*

13 The ALJ gave significant weight to Dr. Saue's medical opinion because it
14 was generally consistent with the opinion of Dr. Shoemaker and with the
15 longitudinal evidence contained in the record. AR 38.

16 Plaintiff argues the ALJ erred in giving significant weight to Dr. Saue's
17 opinion for two reasons. First, Plaintiff argues that as a non-examining physician,
18 Dr. Saue's opinion was owed the least weight of any acceptable medical source.
19 Second, Plaintiff argues the ALJ erred in giving Dr. Saue's opinion significant
20 weight because the opinion was based only on the evidence available to Dr. Saue
21 in late 2015. This means Dr. Saue's opinion did not consider medical evidence of
22 Plaintiff's bilateral hip CAM-type femoral acetabular impingement, which became
23 available in 2016; reports of increased left shoulder pain in 2016; reports of
24 increased lumbar spine issues in 2017; and evidence of bilateral distal GSV
25 incompetence in 2017.

26 The Court finds the ALJ did not err in assigning significant weight to Dr.
27 Saue's medical opinion. The Court agrees that, generally speaking, the opinion of a
28 treating physician, such as Dr. Shoemaker, carries more weight than that of a non-

1 examining physician. *Holohan*, 246 F.3d at 1202. However, this is not a case
2 where the ALJ assigned more weight to the opinion of a non-examining source
3 over the opinion of a treating source. The ALJ in this case gave significant weight
4 the opinions of both Dr. Shoemaker and Dr. Saue – not one over the other.

5 Additionally, the Court finds the ALJ evaluated Dr. Saue’s opinion based on
6 a reasonable interpretation of the record. The ALJ gave significant weight to Dr.
7 Saue’s opinion primarily because it was consistent with Dr. Shoemaker’s 2017
8 opinion and the longitudinal evidence in the record. AR 38. Plaintiff attempts to
9 offer an alternative evaluation of Dr. Saue’s opinion. Where, as here, “the evidence
10 is susceptible to more than one rational interpretation, it is the ALJ’s conclusion
11 that must be upheld.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2000).
12 Accordingly, the Court finds no error.

13 **(2) The ALJ Properly Assessed Plaintiff’s Subjective Symptom Testimony.**

14 Plaintiff argues the ALJ improperly discredited her testimony concerning the
15 severity of her impairments. An ALJ engages in a two-step analysis to determine
16 whether a claimant’s testimony regarding subjective pain or symptoms is credible.
17 *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). “First, the ALJ must
18 determine whether the claimant has presented objective medical evidence of an
19 underlying impairment ‘which could reasonably be expected to produce the pain or
20 other symptoms alleged.’ ” *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028,
21 1036 (9th Cir. 2007)). In this analysis, the claimant is not required to show “that
22 [his] impairment could reasonably be expected to cause the severity of the
23 symptom [he] has alleged; [he] need only show that it could reasonably have
24 caused some degree of that symptom.” *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th
25 Cir. 1996). Nor must a claimant produce “objective medical evidence of the pain or
26 fatigue itself, or the severity thereof.” *Id.*

27 If the claimant satisfies the first step of this analysis, and there is no
28 evidence of malingering, “the ALJ can reject the claimant’s testimony about the

1 severity of [his] symptoms only by offering specific, clear and convincing reasons
2 to do so.” *Id.* at 1281. This is not an easy standard to satisfy. “The clear and
3 convincing standard is the most demanding required in Social Security cases.”
4 *Moore v. Comm’r of Soc. Sec. Admin*, 278 F.3d 920, 924 (9th Cir. 2002).

5 At the hearing, Plaintiff testified that she cannot work because she cannot
6 bend over, stand, or sit for any period of time due to pain. AR 96. She testified
7 that she spends significant portions of the day lying down or in a recliner with her
8 legs elevated. AR 103.

9 The ALJ found Plaintiff’s medically determinable impairments could
10 reasonably be expected to cause her alleged symptoms. AR 32. However, the ALJ
11 found Plaintiff’s statements concerning the intensity, persistence, and limiting
12 effects of the symptoms not credible in light of the medical evidence and other
13 evidence in the record. *Id.*

14 The ALJ first discredited Plaintiff’s subjective symptom claims because
15 evidence in the record showed Plaintiff’s symptoms improved with medical
16 treatment. “[E]vidence of medical treatment successfully relieving symptoms can
17 undermine a claim of disability.” *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th
18 Cir. 2017). For example, after undergoing total left knee replacement in March
19 2014, postoperative records showed Plaintiff’s knee function had improved. At an
20 appointment on April 2, 2014, Plaintiff reported her knee pain was a 2/10 and
21 denied any numbness or tingling. AR 791. At another appointment on July 14,
22 2014, Plaintiff reported having her knee pain was a 0/10. AR 795. Plaintiff also
23 reported she felt good walking and denied any locking, popping, numbness, or
24 tingling. *Id.* Similarly, Plaintiff denied any knee pain locking, popping, numbness,
25 or tingling at postoperative appointments in October 2014 and March 2015. AR
26 799, 803. The ALJ found this evidence was inconsistent with Plaintiff’s allegations
27 of disabling knee pain. AR 33.

1 The ALJ also noted that after Plaintiff received a steroid injection into her
2 right hip in January 2017, she reported complete relief of pain. AR 1038, 1052.
3 And after receiving a right SI joint injection in May 2017, Plaintiff reported
4 immediate pain relief. AR 1052. As for Plaintiff's back impairments, the ALJ
5 found medical records showed improvement after surgery in November 2016. AR
6 34.

7 Plaintiff's migraine headaches also appeared to improve with treatment. For
8 example, on November 6, 2015, and April 3, 2017, Plaintiff reported taking
9 gabapentin for her headaches and that the medication was effective in treating her
10 symptoms. AR 1105, 1130. Additionally, Plaintiff reported receiving Botox
11 injections which also served to treat her headaches. AR 1130.

12 The Court finds the ALJ's first reason satisfies the specific, clear and
13 convincing standard. *Smolen*, 80 F.3d at 1281. The ALJ identified numerous,
14 specific ways in which Plaintiff's impairments improved as a result of medical
15 treatment, and how these reported improvements were inconsistent with Plaintiff's
16 symptom claims. The ALJ's findings are reasonable and based on substantial
17 evidence in the record.

18 The ALJ also found Plaintiff's subjective symptom claims were inconsistent
19 with her work activity as a foster parent. "Engaging in daily activities that are
20 incompatible with the severity of symptoms alleged can support an adverse
21 credibility determination." *Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th Cir. 2014).
22 The ALJ noted that from June 2015 through April 2017, Plaintiff obtained a foster
23 care home license through Washington state. Plaintiff and her middle son helped
24 care for as many as seven foster children at one time, including a 16-month old
25 baby from February 2016 through May 2017. AR 36.

26 At the hearing, Plaintiff testified that she received a note from her doctor in
27 support of her application to become a foster parent, under two conditions: (1)
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1 someone had to be around when she was caring for a foster child; and (2) she could
2 only care for a foster child if her medications did not impair her. AR 97.

3 The ALJ found Plaintiff's testimony unpersuasive for several reasons. First,
4 Plaintiff did not submit her alleged doctor's note supporting her foster care
5 application. Thus, her testimony regarding the contents of the doctor's note were
6 not corroborated by any evidence. In fact, contrary to Plaintiff's testimony, she
7 asked her provider in September 2015 to write a letter stating that her medication
8 would not impede her ability to work with foster kids. AR 869.

9 Second, the ALJ found Plaintiff's alleged physical limitations are
10 inconsistent with the requirements of a foster parent in Washington. Under the
11 Washington Administrative Code, to become a foster parent one must demonstrate
12 that he or she possesses the "understanding, ability, physical health, emotional
13 stability and personality suited to meet the physical, mental, emotional cultural,
14 and social needs of children in your care." WAC § 110-148-1365.

15 Third, the ALJ found that while Plaintiff testified she shared foster parenting
16 responsibilities with one of her sons, and only cared for the foster children when
17 her son was busy, AR 96, Plaintiff later revealed that her son had a regular eight-
18 hour job. AR 99. Thus, contrary to the caveat contained in the alleged doctor's
19 note, Plaintiff was alone with the foster children for at least eight hours a day.

20 Fourth, Plaintiff testified that her son moved out of her home in December
21 2016. AR 99. Given that Plaintiff was providing foster care to a 16-month old baby
22 until March 2017, the ALJ reasonably inferred that Plaintiff must have been caring
23 for the infant for several months on her own. AR 37.

24 Finally, at the hearing the vocational expert testified that the work of a foster
25 parent is characterized as medium, semi-skilled work. AR 108-09. Thus, the ALJ
26 found Plaintiff had the physical and/or mental capability to meet the demands of
27 this level of work. AR 38.

1 The Court finds the ALJ's second reason for discrediting Plaintiff's
2 subjective symptom claims also satisfies the specific, clear and convincing
3 standard. *Smolen*, 80 F.3d at 1281. The ALJ identified specific inconsistencies
4 between the severity Plaintiff's alleged symptoms and her daily activities as a
5 foster parent. The ALJ's finding is reasonable and based on substantial evidence in
6 the record.

7 The ALJ also discounted some of Plaintiff's subjective symptom claims
8 because they were not corroborated by the objective medical evidence. *See, e.g.*,
9 AR 33 ("Although [Plaintiff] has complained of disabling hip pain to providers,
10 her allegations are out of proportion to the objective findings."). "While subjective
11 pain testimony cannot be rejected on the sole ground that it is not fully
12 corroborated by objective medical evidence, the medical evidence is still a relevant
13 factor in determining the severity of the claimant's pain and its disabling effects."
14 *Rollins*, 261 F.3d at 857 (citing 20 C.F.R. § 404.1529(c)(2)). Given that the ALJ
15 provided other acceptable reasons for finding Plaintiff's testimony not credible, the
16 Court finds no error.

17 **(3) The ALJ Properly Considered Plaintiff's Migraines.**

18 Plaintiff restates her argument that the ALJ failed to properly consider her
19 subjective symptom claims. As indicated above, the ALJ reasonably found that
20 Plaintiff's headaches improved with medical treatment. In fact, at the hearing
21 Plaintiff reported migraines were no longer an issue. AR 100 – 01. Thus, Court
22 finds no error.

23 **(4) The ALJ Properly Assessed the Listings.**

24 Plaintiff contends the ALJ failed to properly assess whether her impairments
25 meet or equal the Listings. If a claimant's impairment meets or equals one of the
26 listed impairments, the claimant is *per se* disabled and qualifies for benefits. 20
27 C.F.R. § 404.1520(d).

1 Each listing sets forth the “symptoms, signs, and laboratory findings” that
2 must be established in order for a claimant’s impairment to meet the listing.
3 *Tackett*, 180 F.3d at 1100. The claimant bears the burden of proving their
4 impairment meets or equals one of the listed impairments. *Id.* A mere diagnosis
5 does not suffice to establish disability. *Key v. Heckler*, 754 F.2d 1545, 1549-50
6 (9th Cir. 1985).” “[An impairment] must also have the findings shown in the
7 Listing of that impairment.” *Id.* at 1549-50; *see also* 20 C.F.R. § 404.1525(d). To
8 meet a listing, a claimant must show that her impairment meets “all of the specified
9 medical criteria. An impairment that manifests only some of those criteria, no
10 matter how severely, does not qualify.” *Sullivan v. Zebley*, 493 U.S. 521, 530
11 (1990).

12 “An ALJ must evaluate the relevant evidence before concluding that a
13 claimant’s impairments do not meet or equal a listed impairment. A boilerplate
14 finding is insufficient to support a conclusion that a claimant’s impairments does
15 not do so.” *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).

16 Plaintiff argues the ALJ failed to properly assess the Listings with respect to
17 her edema and migraines.

18 **A. Listing 4.11A**

19 Plaintiff argues her impairments meet the medical criteria for Listing 4.11A.
20 Listing 4.11A requires chronic venous insufficiency of a lower extremity with
21 incompetency or obstruction of the deep venous system, and “[e]xtensive brawny
22 edema [] involving at least two-thirds of the leg between the ankle and knee or the
23 distal one-third of the lower extremity between the ankle and hip.” 20 C.F.R. Pt.
24 404, Subpt. P, App. 1, 4.11A.

25 Plaintiff cites to several pieces of evidence that suggest Plaintiff’s lower
26 extremity edema was “significant.” AR 1133, 1135, 1137, 1142. Listing 4.11A,
27 however, does not require “significant” lower extremity edema; it requires
28 “[e]xtensive brawny edema [] involving at least two-thirds of the leg between the

1 ankle and knee or the distal one-third of the lower extremity between the ankle and
2 hip.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, 4.11A. Thus, even if the ALJ erred in
3 failing to address Listing 4.11A, Plaintiff does not show that her impairments meet
4 “all of the specified medical criteria” of this listing. *Sullivan v.*, 493 U.S. at 530.
5 Accordingly, any such error is harmless. *Molina*, 674 F.3d at 1111.

6 **B. Listing 11.02B**

7 Plaintiff also argues her migraines meet Listing 11.02B. The Court
8 disagrees. The ALJ found Plaintiff’s headaches do not medically equal the Listing
9 because they have been responsive to treatment. AR 31. For example, on
10 November 6, 2015, and April 3, 2017, Plaintiff reported taking gabapentin for her
11 headaches and that the medication was effective in treating her symptoms. AR
12 1105, 1130. Plaintiff also reported taking Botox injections which also served to
13 treat her headaches. AR 1130. The ALJ’s determination was reasonable and based
14 on substantial evidence. Accordingly, the Court finds no error.

15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 1. Plaintiff’s Motion for Summary Judgment, ECF No. 11, is **DENIED**.
17 2. Defendant’s Motion for Summary Judgment, ECF No. 12, is **GRANTED**.
18 3. The Decision of the Commissioner is **AFFIRMED**.
19 4. The District Court Executive is directed to enter judgment in favor of
20 Defendant and against Plaintiff.

21 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
22 this Order and provide copies to counsel and close the file
23 **DATED** this 9th day of August 2019.



27 

28 Stanley A. Bastian

United States District Judge

**ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ^ 17**